Supreme Court, U.S.
FILED

991580 MAR 27 2000

OFFICE OF THE CLERK

No. 99-

IN THE

Supreme Court of the United States

LETICIA JARAMILLO and JOSEPH REY,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

BRUCE A. EISEN
Counsel of Record
DAVID O. BICKART
DEAN C. GARFIELD
KAYE, SCHOLER, FIERMAN
HAYS & HANDLER, LLP
Attorneys for Petitioners
901 15th Street, N.W.
Washington, DC 20005
(202) 682-3538

158666

Counsel Press LLC
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED FOR REVIEW

1. Is a member of the listening audience entitled to judicial review of an FCC broadcast license renewal order under 47 U.S.C. § 402(b)(6), which provides for judicial review by "any . . . person who is aggrieved or whose interests are adversely affected" by such an order?

2. Is a member of the listening audience entitled to judicial review of an FCC broadcast license renewal order where the grounds for such review are based upon the licensee's dishonesty, rather than the content of its programming?

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, Press Communications, LLC (formerly Press Broadcasting Company, Inc.) was a party to the proceeding before the Federal Communications Commission and before the United States Court of Appeals for the District of Columbia Circuit and is being served as a respondent herein.

TABLE OF CONTENTS

	Page
Questions Presented for Review	i
Parties to the Proceeding	ii
Table of Contents	iii
Table of Cited Authorities	iv
Table of Appendices	vi
Opinions Below	1
Statement of Jurisdiction	1
Constitutional and Statutory Provisions Involved	1
Statement of the Case	2
Reasons for Granting the Writ	3
Conclusion	6

TABLE OF CITED AUTHORITIES

Page

Cases:

Association of Data Processing Serv. Org., Inc. v. *Camp*, 397 U.S. 150 (1970) 4, 5

Columbia Broadcasting Sys., Inc. v. *FCC*, 453 U.S. 367 (1981) 5

Columbia Broadcasting Sys., Inc. v. *Democratic Nat. Comm.*, 412 U.S. 94 (1973) 2, 5

FCC v. *Sanders Bros. Radio Station*, 309 U.S. 470 (1940) 4, 5

FCC v. *WOKO, Inc.*, 329 U.S. 223 (1946) 2

Federal Election Commission v. *Akins*, 524 U.S. 11 (1998) 5

Friends of the Earth, Inc. v. *Laidlaw Environmental Services, Inc.*, 120 S. Ct. 693 (2000) 3

Office of Communication of United Church of Christ v. *FCC*, 359 F.2d 994 (D.C. Cir. 1966) 4, 5

Cited Authorities

	Page
Statutes:	
28 U.S.C. § 1254(1)	1
47 U.S.C. § 307(c)(1)	2
47 U.S.C. § 308(b)	2
47 U.S.C. § 309(a)	2
47 U.S.C. § 402(b)	3, 4
47 U.S.C. §§ 402(b)(1-4)	4
47 U.S.C. § 402(b)(2)	3
47 U.S.C. § 402(b)(6)	i, 1, 2, 3, 4, 5
47 U.S.C. § 407(b)(6)	4
United States Constitution:	
Article III	1, 4
Other Authority:	
D.H. Ginsburg, M.H. Botein and M.D. Director, *Regulation of the Electronic Mass Media* 137 (2d ed. 1991)	4

TABLE OF APPENDICES

Page

Appendix A — Order Of The United States Court Of Appeals For The District Of Columbia Circuit Dated And Filed October 12, 1999 ..... 1a

Appendix B — Memorandum Opinion And Order Of The Federal Communications Commission Adopted May 28, 1999 And Released June 7, 1999 ..... 3a

Appendix C — Order Of The United States Court Of Appeals For The District Of Columbia Circuit Denying Petition For Rehearing Dated And Filed December 27, 1999 ..... 6a

Petitioners, Leticia Jaramillo and Joseph Rey ("Jaramillo and Rey"), by their attorneys, hereby respectfully request the issuance of a writ of certiorari reviewing the judgment below of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

Petitioners sought to appeal a decision of the Federal Communications Commission ("Commission" or "FCC") before the United States Court of Appeals for the District of Columbia Circuit ("Court of Appeals"). The opinion of the Court of Appeals, a copy of which is attached as Appendix A, is unreported. The opinion of the Commission, a copy of which is attached as Appendix B, is reported at 14 FCC 9296 (1999).

STATEMENT OF JURISDICTION

The Judgment of the United States Court of Appeals for the District of Columbia Circuit was entered on October 12, 1999. The Court of Appeals denied a timely petition for rehearing on December 27, 1999. The opinion of the Court of Appeals, a copy of which is attached as Appendix C, is unreported. This Court has jurisdiction to review the judgment of the Court of Appeals pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions implicated by the decision of the Court of Appeals are Article III, Section 2 of the United States Constitution, and 47 U.S.C. § 402(b)(6). Article III, Section 2 provides, in relevant part that, "[t]he judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and . . . to Controversies . . ."

47 U.S.C. § 402(b)(6) provides that

> [a]ppeals may be taken from decisions and orders of the Commission to the United States Court of Appeals for the District of Columbia . . . by any other person who is aggrieved or whose interests are adversely affected by any Order of the Commission granting or denying any application described in paragraphs (1), (2), (3), (4), and (9) of this subsection.[1]

STATEMENT OF THE CASE

In predicting whether "the public interest, convenience or necessity" will be served by renewing a broadcast license, the FCC must consider, among other things, the applicant's "character, background and training." *FCC* v. *WOKO, Inc.*, 329 U.S. 223, 229 (1946); 47 U.S.C. §§ 309(a) (considerations in granting or renewing license) and 308(b) (application requirements). License renewal proceedings, "in which the listening public can be heard," are a "principal means" of assuring that the licensee will meet its overriding public interest obligations. *See Columbia Broadcasting Sys.* v. *Democratic Nat. Comm.*, 412 U.S. 94, 110 (1973).

Petitioners Letitia Jaramillo and Joseph Rey live in central Florida, where they are viewers of Station WKCF(TV), which operates on Channel 18 at Clermont, Florida, and serves the Orlando area. In 1996, Press Broadcasting Company, Inc. ("Press") applied to the FCC to renew its license for WKCF(TV). Petitioners opposed Press' license renewal application on the ground that Press lacked the character required of all FCC licensees. In support, petitioners submitted to the FCC evidence that Press had aided and abetted a fraudulent exchange of channels that ultimately allowed it to operate on

---

1. The application at issue, and that was contested by petitioners before the FCC, was an application for license renewal pursuant to 47 U.S.C. § 307(c)(1).

Channel 18 at Clermont, Florida.[2] Petitioners' evidence included the declaration of one of the participants in the transaction indicating that the exchange of channels was accomplished through money laundering. The FCC nevertheless issued an order renewing the license to Press.

Petitioners sought judicial review under Section 402(b) of the Communications Act , which provides for judicial review in the United States Court of Appeals for the District of Columbia of any FCC license renewal order both by the renewal applicant and by "any other person who is aggrieved or whose interests are adversely affected" by such order. 47 U.S.C. §§ 402(b)(2) (renewal applicant) and 402(b)(6) ("any other person"). The Court of Appeals dismissed the petition for review. The court's cryptic one-paragraph opinion concluded that petitioners had "not demonstrated that they have standing as members of the viewing public."[3] Petitioners timely sought rehearing, which the Court of Appeals denied.

REASONS FOR GRANTING THE WRIT

The petition for a writ of certiorari should be granted because the opinion below conflicts with this Court's decisions governing judicial review under the Communications Act. The decision below also threatens to curtail or eliminate entirely the right of members of the broadcast audience to challenge,

2. Petitioners were principals of Rainbow Broadcasting, Ltd. which operated WRBW (TV) in competition with WKCF(TV) until WRBW(TV) was sold in 1999. At the time that petitioners filed their opposition to Press' license renewal, WKCF(TV) still competed with WRBW(TV). The FCC granted Press' assignment of license of WKCF(TV) in September, 1999 and dismissed a petition to deny the sale. That decision has been appealed to the full commission and remains pending.

3. The Court's holding that petitioners' competitive harm is "entirely hypothetical" also clouds the concept of competitor standing. Given that petitioners continued to compete with Press at the time they filed their petition — the relevant period for examining a party's standing — it is erroneous to conclude that petitioners' injury as a competitor was conjectural. *See Friends of the Earth, Inc.* v. *Laidlaw Environmental Services, Inc.*, 120 S. Ct. 693, 705 (2000).

for any reason, the FCC's decision to grant or renew a license to broadcast into their viewing area.

Section 402(b) of the Communications Act entitles license applicants to judicial review of FCC orders respecting their licensing applications or renewal applications (e.g. orders denying renewal). 47 U.S.C. §§ 402(b)(1-4). Section 402(b)(6) grants a parallel entitlement to "any other person aggrieved or whose interests are adversely affected" by such orders (e.g., orders granting renewal) . 47 U.S.C. § 407(b)(6). In *FCC* v. *Sanders Bros. Radio Station,* 309 U.S. 470, 477 (1940), this Court held unanimously that while the Communications Act's purpose was "to protect the public" rather than competitors, a competitor was entitled under the predecessor of Section 402(b)(6) "to appeal and to raise in [court] *any* relevant question of law" respecting an FCC licensing order (emphasis added). In so holding this Court recognized the obvious self-interest that competitors have in monitoring FCC license decisions, but it necessarily concluded "that the need for some representation of the public interest" in judicial challenges "outweighed the need that it be selfless." D.H. Ginsburg, M.H. Botein and M.D. Director, *Regulation of the Electronic Mass Media* 137 (2d ed. 1991). In *Office of Communication of United Church of Christ* v. *FCC*, 359 F.2d 994, 999 (D.C. Cir. 1966) the D.C. Circuit, relying on *Sanders* and recognizing that members of the listening public, as opposed to competitors, "may be the only objectors" in renewal proceedings, held that members of the listening public were likewise among the class of persons sufficiently interested in a licensing determination to participate in that determination and to seek judicial review under section 402(b). 359 F.2d at 399 n.8.[4]

This Court has repeatedly endorsed the teaching of then Judge Burger in *United Church of Christ. See, e.g., Association*

---

4. The parties agreed, and the DC Circuit concluded, that standing to participate before the FCC and to seek judicial review were governed by the same principles that govern standing under Article III.

of Data Processing Serv. Org., Inc. v. *Camp*, 397 U.S. 150, 154 (1970) (recognizing range of values that may legitimately be vindicated by judicial review); *Columbia Broadcasting Sys., supra.* (recognizing role of public participation in FCC licensing scheme). Indeed, less than two years ago, in sustaining the standing of voters under the Federal Election Campaign Act and Article III to challenge a Federal Election Commission decision, this Court twinned *Sanders* and *Church of Christ* for the proposition that when Congress employs the word "aggrieved"— as it has done in the Communications Act and the FECA — it has signaled its intent "to cast the standing net broadly. . . ." *Federal Election Commission* v. *Akins*, 524 U.S. 11, 19 (1998).

By holding that petitioners, as members of the WKCF(TV) viewing area, lacked standing to seek judicial review of the FCC's license renewal order, the Court of Appeals has narrowed "the standing net" that Congress created when it enacted Section 402(b)(6) and has contravened the holding in *United Church of Christ* — which this Court has also embraced. For almost 35 years the principle recognized in *United Church of Christ* has protected the interest that all members of the viewing public have in who will be licensed to broadcast into their viewing area. The DC Circuit, the only Court of Appeals to which FCC licensing appeals may be taken, should not be permitted to repudiate *United Church of Christ*, without this Court's review.

Nor can *United Church of Christ* be distinguished as involving a viewer challenge based upon the applicant's past broadcasts, rather than the applicant's character. The foundational principle supporting both challenges is the same — the "enforceable public obligation" of broadcasters to serve the public interest. *Columbia Broadcasting Sys., Inc.* v. *FCC*, 453 U.S. 367, 396 (1981) (citing *United Church of Christ*, 359 F.2d at 1003). Moreover, any such distinction cannot be drawn without repudiating this Court's holding in *Sanders*, which recognizes that a challenger may seek judicial review on "any"

question that is material to the ultimate license renewal decision. There is no basis in this Court's precedents for creating a dual class of persons "aggrieved" by the award or renewal of a broadcast license, a "first class," consisting of competitors, who can challenge the license on any relevant ground, and a "second class," consisting of mere members of the viewing audience, who may challenge the license on some relevant grounds, but not others.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

BRUCE A. EISEN
Counsel of Record
DAVID O. BICKART
DEAN C. GARFIELD
KAYE, SCHOLER, FIERMAN
HAYS & HANDLER, LLP
Attorneys for Petitioners
901 15th Street, N.W.
Washington, DC 20005
(202) 682-3538

APPENDIX

APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT DATED AND FILED OCTOBER 12, 1999

UNITED STATES COURT OF APPEALS
For The District of Columbia Circuit

September Term, 1999

No. 99-1264

Leticia Jaramillo and Joseph Rey,

Appellants

v.

Federal Communications Commission,

Appellee

Press Communications LLC,

Intervenor

BEFORE: Silberman, Henderson, and Tatel, Circuit Judges

ORDER

Upon consideration of the motion to dismiss, the responses thereto, and the reply, it is

ORDERED that the motion to dismiss be granted. Appellants have not met their burden of clearly alleging facts

that would establish standing to bring this action. Appellants have not demonstrated that they have standing as members of the viewing public, *see Jaramillo v. FCC*, 162 F.3d 675 (D.C. Cir. 1998), nor can they be considered to have competitor standing as their alleged future injury is entirely hypothetical. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (holding that injury must be "actual or imminent, not 'conjectural' or 'hypothetical' ").

The Clerk is directed to withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing or petition for rehearing en banc. *See* Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam
s/ JHS
s/ KLH

APPENDIX B — MEMORANDUM OPINION AND ORDER OF THE FEDERAL COMMUNICATIONS COMMISSION ADOPTED MAY 28, 1999 AND RELEASED JUNE 7, 1999

Federal Communications Commission

Before the
Federal Communications Commission
Washington, D.C. 20554

File No. BRCT-961001ZK

File No. BALCT-970603IA
BAL-970603IB
BALH-970603IC
BALH-970603ID
BALTVL-970603IE

In re Applications of

PRESS BROADCASTING COMPANY, INC.

For Renewal of License of Station WKCF(TV),
Clermont, Florida

and

PRESS BROADCASTING COMPANY, INC.

and

PRESS COMMUNICATIONS, LLC

Appendix B

For Consent to the Assignment of the Licenses of Stations WBDU(AM) and WKXW(FM), Trenton, New Jersey, WBSS(FM), Millville, New Jersey, WKCF(TV), Clermont, Florida, and W04CN, Cocoa, Florida

MEMORANDUM OPINION AND ORDER

Adopted: May 28, 1999 **Released: June 7, 1999**

By the Commission: Chairman Kennard not participating.

1. The Commission has before it an application filed February 13, 1998, by Leticia Jaramillo, Joseph Rey and Rainbow Broadcasting, Ltd. (collectively, "Rainbow") for review of the January 14, 1998, letter decision of the Chief, Video Services Division, Mass Media Bureau, denying their petitions to deny the above-captioned applications filed by Press Broadcasting Company, Inc. (Press) for renewal of its license for station WKCF(TV), Channel 18, Clermont, Florida, and for the pro forma assignment of license from Press to Press Communications, LLC. Press filed an opposition on March 2, 1998.

2. As initially filed, the petitions to deny were based on the same facts, circumstances and arguments raised by Rainbow, and rejected by the Commission, in connection with an application to assign the license of station WTKS(FM), Cocoa Beach, Florida, from Press to Paxson Broadcasting of Orlando, L.P. *Press Broadcasting Company, Inc.*, 13 FCC Red 1026 (1998), *appeal dismissed, Leticia Jaramillo v. FCC*, 162 F.3d 675 (D.C. Cir. 1998). Rainbow supplemented the petitions on May 1, 1997, citing to

language in an *Initial Decision* granting Rainbow's application for extension of time to construct WRBW-TV, Orlando, Florida, which, they contend, raises a substantial and material question of fact requiring designation of the above-referenced applications for a hearing. *See Initial Decision*, 12 FCC Red 4028, 4048, 4059 (ALJ 1997). In affirming the *Initial Decision*, however, the Commission specifically disavowed the ALJ's language on which Rainbow relies. *Rainbow Broadcasting Company*, FCC 98-185 at n.2 (released August 5, 1998), *aff'd, Press Communications, Inc. v. FCC*, Case No. 98-1366 (D. C. Cir., May 25, 1999).

3. In view of the foregoing and based on our review of the Bureau's underlying decision, we conclude that no basis exists to warrant reversal. Accordingly, IT IS ORDERED, That pursuant to Section 1.115(g) of the Commission's Rules, the Application for Review filed by Leticia Jaramillo, Joseph Rey and Rainbow Broadcasting, Ltd. IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION
s/ Magalie Roman Salas
Magalie Roman Salas
Secretary

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED DECEMBER 27, 1999

UNITED STATES COURT OF APPEALS
For The District of Columbia Circuit

September Term, 1999

No. 99-1264

Leticia Jaramillo and Joseph Rey,

Appellants

v.

Federal Communications Commission,

Appellee

Press Communications LLC,

Intervenor

BEFORE: Edwards, Chief, Judge; Silberman, Williams, Ginsburg, Sentelle, Henderson, Randolph, Rogers, Tatel and Garland, Circuit Judges

Appendix C

ORDER

Upon consideration of appellants' petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: s/ Robert A. Bonner
Robert A. Bonner
Deputy Clerk

Supreme Court, U.S.
FILED
MAY 30 2000
CLERK

(2)

No. 99-1580

In the Supreme Court of the United States

LETICIA JARAMILLO AND JOSEPH REY, PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

SETH P. WAXMAN
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

CHRISTOPHER J. WRIGHT
General Counsel

DANIEL M. ARMSTRONG
Associate General Counsel

JOEL MARCUS
Counsel
Federal Communications Commission
Washington, D.C. 20554

9pp

QUESTION PRESENTED

Whether the court of appeals correctly held that petitioners lack standing to challenge the renewal of a broadcast license.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	3
Conclusion	6

TABLE OF AUTHORITIES

Cases:

FCC v. *Sanders Bros. Radio Station*, 309 U.S. 470 (1940)	4
Federal Election Comm'n v. *Akins*, 524 U.S. 11 (1998)	4
Jaramillo v. *FCC*, 162 F.3d 675 (D.C. Cir. 1998)	2, 3, 4, 5
Lujan v. *Defenders of Wildlife*, 504 U.S. 555 (1992)	4
Press Broadcasting Co., 13 FCCR 1026 (1998), appeal dismissed *sub nom. Jaramillo* v. *FCC*, 162 F.3d 675 (D.C. Cir.)	2
United Church of Christ v. *FCC*, 359 F.2d 994 (D.C. Cir. 1966)	5
Wisniewski v. *United States*, 353 U.S. 901 (1957)	5

Constitution and statute:

U.S. Const. Art. III	3, 4
47 U.S.C. 402(b)(6)	4

In the Supreme Court of the United States

No. 99-1580

LETICIA JARAMILLO AND JOSEPH REY, PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The order of the court of appeals (Pet. App. 1a-2a) is unreported. The decision of the Federal Communication Commission (Pet. App. 3a-5a) is reported at 14 FCCR 9296.

JURISDICTION

The order of the court of appeals was entered on October 12, 1999. A petition for rehearing was denied on December 27, 1999 (Pet. App. 6a-7a). The petition for a writ of certiorari was filed on March 27, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In June 1999, the Federal Communications Commission (FCC or Commission) affirmed, over the objections of petitioners, the renewal of the license of Press Broadcasting Co. (Press) for television station WKCF(TV) licensed to serve Clermont, Florida. See Pet. App. 3a-5a (*Press II*). Petitioners had objected to the renewal on the ground that Press lacked the requisite character qualifications to retain its license. The principal bases for that claim were allegations of deception of the FCC and tax evasion by Press in connection with its acquisition of WKCF(TV) in the mid-1980s. Pet. App. 4a (citing *Press Broadcasting Co.*, 13 FCCR 1026 (1998)).

2. Petitioners had raised the same contentions in objecting to an earlier transaction in which Press sold the license of a station it owned in Cocoa Beach, Florida. See *Press Broadcasting Co.*, 13 FCCR 1026 (1998) (*Press I*), appeal dismissed *sub nom. Jaramillo* v. *FCC*, 162 F.3d 675 (D.C. Cir. 1998) (*Jaramillo I*). The Commission rejected the allegations in the Cocoa Beach proceeding, finding them without merit and insufficient to deny approval of the transaction. *Press I*, 13 FCCR 1028-1029. After the Commission decided *Press I*, petitioners sought judicial review of that decision. The court dismissed the case for lack of standing. *Jaramillo I*, 162 F.3d at 676-677. The appeals court found that petitioners had not shown any injury, as either listeners of the Cocoa Beach station or competitors with that station,* that could be redressed by judicial review. To

---

* Petitioners at the time owned stations in Florida that competed with the Clermont station and others owned by Press. There is no claim of competitor standing in this case, as petitioners

have standing as a listener, the court ruled, one must "object to Commission decisions that would create or extend some arguably program-impairing circumstance, such as a duopoly * * * or a renewal of a license for a firm guilty of broadcast policy violations," such as violations of the Fairness Doctrine. *Id.* at 677. By contrast, petitioners' only concrete interest in the matter was "to seek the simple satisfaction of seeing the laws enforced." *Ibid.* The court found that concern insufficient to confer standing under Article III.

3. Relying on its findings in *Press I*, the Commission in *Press II* rejected petitioners' claims with respect to the Clermont station. Pet. App. 4a. Petitioners sought judicial review of *Press II*, and, in the order on review, the appeals court dismissed the case for lack of standing. The court held that petitioners had "not met their burden of clearly alleging facts that would establish standing to bring this action." *Id.* at 1a-2a. Specifically, they had "not demonstrated that they have standing as members of the viewing public." *Id.* at 2a (citing *Jaramillo I*, 162 F.3d at 677). Neither had petitioners shown themselves to have standing as a competitor, for "their alleged future injury is entirely hypothetical." *Ibid.*

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is not warranted.

1. The court of appeals correctly found that petitioners lack standing. In order to have standing under

---

have sold the station that competed with Press's Clermont station. See Pet. 3 n.2.

Article III, a litigant must demonstrate that it has suffered a concrete injury that was caused by the action complained of and will be redressed by a decision in its favor. See *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992). Petitioners claim to have standing as viewers of the Clermont station, but neither before the court of appeals nor in this Court have they identified an actual injury that would be redressed by a reversal of the FCC's decision here. That is particularly so now that Press has sold the Clermont station, see Pet. 3 n.2, and is no longer the licensee. In that situation, as the court of appeals found in identical circumstances in *Jaramillo I*, there is "no serious causal link between FCC scrutiny of the conduct of a licensee who seeks to *depart* from operation of a station and any possible material impairment of [petitioners'] hopes or expectations as listeners." 162 F.3d at 676-677.

Instead of demonstrating that they have suffered a particular, redressable injury, petitioners claim a right to challenge "for any reason" an FCC decision to grant or renew a license. Pet. 3-4. Petitioners claim (Pet. 4) to find such a right in 47 U.S.C. 402(b)(6), which allows any "aggrieved" person to seek judicial review of an FCC licensing decision. Pet. 4. Nothing in the statute, of course, purports to override the requirements of Article III standing, nor could it do so. The broad statutory grant of permission to seek review may be sufficient to meet the judicially imposed test for prudential standing, but a concrete injury in fact is a constitutional requirement in every case. See *Federal Election Comm'n* v. *Akins*, 524 U.S. 11, 19-20 (1998).

2. Petitioners also claim that the court of appeals' decision conflicts with *FCC* v. *Sanders Brothers Radio Station*, 309 U.S. 470 (1940). There, the Court ruled that an existing licensee had standing to challenge the

FCC's licensing of a competing station in the same market. The existing station suffered an obvious redressable injury—an increase in competition—that makes *Sanders Brothers* entirely unlike this case. Contrary to petitioners' assertion (Pet. 6), listeners are not always in the same position as competitors, which can suffer an actual economic injury from improper licensing.

Similarly, the District of Columbia Circuit's earlier decision in *United Church of Christ* v. *FCC*, 359 F.2d 994 (1966) (*UCC*), creates no conflict. *UCC* found that listeners had standing when they complained of matters that directly affected them as listeners, such as "programming deficiencies or offensive overcommercialization." *Id.* at 1005. In this case, by contrast, petitioners have not set forth any "program-impairing circumstance" that actually affects their listening. *Jaramillo I*, 165 F.3d at 677. Thus, even if this Court had somehow adopted *UCC* in its own holdings as petitioners assert (Pet. 4-5), there is no conflict. Petitioners' central concern continues to be the abstract issue of the FCC's enforcement of the law, which is insufficient to confer standing. Moreover, *UCC* is also a decision of the District of Columbia Circuit, and any intra-circuit conflict does not provide a basis for further review. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam) ("It is primarily the task of a Court of Appeals to reconcile its internal difficulties.").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

CHRISTOPHER J. WRIGHT
General Counsel

DANIEL M. ARMSTRONG
Associate General Counsel

JOEL MARCUS
Counsel
Federal Communications Commission

MAY 2000

(3)

No. 99-1580

Supreme Court, U.S.
FILED
JUN 15 2000
CLERK

IN THE
Supreme Court of the United States

LETICIA JARAMILLO and JOSEPH REY,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF

BRUCE A. EISEN
Counsel of Record
DAVID O. BICKART
DEAN C. GARFIELD
KAYE, SCHOLER, FIERMAN,
HAYS & HANDLER, LLP
Attorneys for Petitioners
901 15th Street, N.W.
Washington, DC 20005
(202) 682-3538

160393

Counsel Press LLC
(800) 274-3321 • (800) 359-6859

4PP

Contrary to the assertions advanced in Respondent's Brief in Opposition, the viewing interests recognized as sufficient to establish standing in *United Church of Christ v. FCC*, 359 F.2d 994 (D.C. Cir. 1966) (Opp. 4-5) (Pet. 4-5) are not limited to interests in a particular sort of programming. In providing an opportunity for judicial review on behalf of any "aggrieved" person, Congress has signaled its intent to "cast the standing net broadly," *Federal Election Commission v. Akins*, 524 U.S. 11, 19 (1998). Nothing in *United Church of Christ* limits viewer standing to those who object to "program impairing circumstances." On the contrary, the court declined to "enumerate[] or characterize[] specifically" what viewer interests should be credited. 359 F.2d at 1005. Rather than impose a judicial straightjacket on public participation rights, *United Church of Christ* and subsequent cases recognized that the FCC was best equipped to evaluate the circumstances under which the viewing audience may be injured or put at risk by licensee misconduct.

As this Court reiterated in *Friends of the Earth v. Laidlaw Environmental Services*, 120 S. Ct. 693, 697 (2000), "reasonable concerns" about the likelihood that licensee misconduct will harm individual interests are sufficient "injury" to satisfy Article III. Thus, in *Llerandi v. FCC*, 863 F.2d 79, 85 (D.C. Cir. 1988) viewers were entitled to challenge a license because of concern that the license award would reduce competition. There was no "program impairing" conduct in *Llerandi* but only the FCC's judgment, articulated in its "duopoly" rule, that broadcaster concentration was likely to reduce viewer choice in some indeterminate fashion. The injury against which petitioners have sought protection in this case is similarly grounded in a longstanding FCC judgment that past conduct is a reliable

indicator of "future broadcast performance." *Character Qualifications in Broadcast Licensing,* 102 F.C.C.2d 1179, 1227 (1986). In establishing its policy concerning licensee "character," the Commission has reasonably concluded that those who have lied to the Commission are not likely to be "reliable operators of their stations." 102 FCC 2d at 1228. Petitioners, as members of the WKCF-TV viewing area, are entitled to receive television service from a reliable station operator. Their injury is not "subjective" or hypothetical; it reflects the FCC's own expert judgment about the link between past licensee conduct and future service That there is a potential risk of receiving service from an unreliable licensee is sufficient injury for standing purposes. *See Duke Power v. Environment Study Group*, 438 U.S. 59 (risk of increased radiation from power plants is sufficient injury); *see also Friends of the Earth v. Laidlaw* (future risk from "excess" effluents is injury, even if they have not been shown to have actually degraded receiving waters).

Finally, that the D.C. Circuit has departed from its precedents on a question of national importance should not insulate its decision from this Court's review. Within the last few weeks this Court has granted at least two petitions for certiorari to review the D.C. Circuit's construction of the Clean Air Act, another law of nationwide application that vests exclusive appellate jurisdiction initially in that Circuit. *See American Trucking Assns v. Browner*, No. 99-1426 (cert. granted, May 30, 2000) and *Browner v. American Trucking Assns*, No. 99-1257 (cert. granted, May 22, 2000).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

BRUCE A. EISEN
Counsel of Record
DAVID O. BICKART
DEAN C. GARFIELD
KAYE, SCHOLER, FIERMAN,
HAYS & HANDLER, LLP
Attorneys for Petitioners
901 15th Street, N.W.
Washington, DC 20005
(202) 682-3538